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January 12, 2001

Hon. Viktor V. Pohorelsky
United States Magistrate Judge
United States District Court for
the Eastern District of New York
United States Courthouse
225 Cadman Plaza East
Brooklyn, New York 11201

Re: *European Community, et al. v. RJR Nabisco, Inc., et al.*
00-CV-6617 (NGG/VVP)

Dear Judge Pohorelsky:

Because Mr. Halloran's letter of January 10, 2001 reads like a request that the Court reconsider its order directing Plaintiffs to submit their retainer agreements to the Court, I reluctantly write in response.

Defendants' request for discovery on the motion to disqualify was not improper as Plaintiffs claim. Although Judge Garaufis stayed discovery on the merits in this case, he expressly noted that there might be discovery on the disqualification issue at the discretion of the Magistrate Judge. At the November 27, 2000 hearing, Judge Garaufis stated, "you'll be hearing from the Magistrate should he need any kind of hearing or discovery on the motion to disqualify." (11/27/00 Tr. at 23.) At a later point the Court stated, "he [the Magistrate Judge] also may need some limited discovery." (11/27/00 Tr. at 48.)

As the Court will recall and as the transcript confirms, after your honor orally issued your recommendation on the motion to disqualify, you directed Plaintiffs' counsel to file the retainer agreements under seal. As this Court well understood, its recommendation on the motion to disqualify is not, as Plaintiffs state, "the end of the matter." The Federal Rules of Civil Procedure require that a district court make a *de novo* determination of any part of a magistrate judge's recommendation that is objected to by a party. Fed. R. Civ. P. 72(b). Thus, as we will be filing timely objections, the issue is still an undecided one. In addition, this matter may be the subject of review in the appellate courts. The district court and any appellate court should have a complete

record, including all the retainer agreements, before making a determination on the important ethics issues presented.

Given the status of this issue before Judge Garaufis, it is necessary that the retainer agreements with both the Departments of Colombia and the European Community be disclosed to Defendants, as we understood this Court to order. We have seen only a few of the agreements in the Colombia case. Plaintiffs argued in their response to Defendants' ethics motion that we were incorrect in assuming that the offending provisions of the retainer agreements extended to all the Colombian agreements as "some contracts are dramatically different from" the three in the record. (Memorandum of Law of the Departments of the Republic of Colombia in Opposition to Defendants' Motion to Disqualify Counsel or Dismiss the Complaint at 4.) Plaintiffs thereby put in issue all the retainer agreements with the Colombian Departments. The district court needs to be fully informed on this issue before it can make any determination, particularly given the fact that the agreements we have seen to date belie the Plaintiffs' assertion.

The EC retainer agreement must be disclosed in order to determine whether similar unethical provisions affect the later-filed EC case. At the November 27, 2000, hearing before Judge Garaufis, the Judge asked counsel for Plaintiffs whether the same ethics motion would apply to the EC retainer agreement, that is, whether it was "similar or do they follow the same basic structure as the retainer agreements, or some of the retainer agreements . . . in the Amazonas case?" (11/27/00 Tr. at 20, excerpts of which are attached to this letter.) Plaintiffs' counsel responded that there were some similarities, but not the offending provisions challenged by Defendants. In response to the question of whether the motion to disqualify was going to extend to the EC case, defense counsel stated that we would need first to see the retainer agreement. (11/27/00 Tr. at 21.) Judge Garaufis suggested that we take the matter up with the Magistrate Judge (11/27/00 Tr. at 24), which we did.

Defendants should not be required to make a decision whether to file a motion to disqualify in the EC case without access to the retainer agreement or to accept at face value Plaintiffs' counsel's assertions about their contents. The ethical violations that have come to light in the Colombian retainer agreements are serious and "troublesome," as recognized by this Court. Defendants and the Court must be allowed to review the EC retainer agreement in order to know whether similar ethical violations are presented by it.

Plaintiffs' claim that the retainer agreements are privileged is wrong. Plaintiffs do not cite a single case for their assertion. It is indisputable that in the Second Circuit, and in the district courts within the Circuit, retainer agreements are not privileged. *See, e.g., Lefcourt v. United States*, 125 F.3d 79, 86 (2d Cir. 1997) ("As a general rule, a client's

identity and fee information are not privileged."); *In re Grand Jury Subpoena Served Upon Doe*, 781 F.2d 238, 247 (2d. Cir. 1986) (en banc) ("We consistently have held that, absent special circumstances, client identity and fee information are not privileged."); *In re Two Grand Jury Subpoenae Duces Tecum Dated August 21, 1985*, 793 F.2d 69, 71-72 (2d Cir. 1986) (requiring the production of a retainer agreement); *Gaus v. Conair Corp.*, 2000 WL 358387 at *3 (S.D.N.Y. April 7, 2000) ("Courts . . . have not hesitated to compel production of written retainer or fee agreements when the information contained therein may be relevant."); *Allen v. West Point-Pepperell, Inc.*, 848 F. Supp. 423, 431 (S.D.N.Y. 1994) ("We find that the retainer agreements . . . are not privileged."); *In re Application of Doe*, 603 F. Supp. 1164, 1167 (E.D.N.Y. 1985) ("An attorney and his client may not claim a privilege to refuse to disclose a fee arrangement . . . absent exceptional circumstances."). Similarly, the strange assertion, without specifics, that disclosure would threaten "national security" is without any force at all.

New York state law further makes clear that there is no attorney-client privilege for retainer agreements. Rule 691.20(a) of the New York Rules of Court requires that every attorney who enters into a retainer agreement in a case involving personal injury or property damage disclose the client identity, the name(s) of the attorney(s) engaged (including attorneys retained by another attorney on a contingent fee basis), the date of the retainer agreement and the terms of compensation. 22 NYCRR 691.20(a). At the conclusion of the case, the attorney must disclose the disposition of the case, the gross recovery and the net recoveries by the client and the attorneys, and an itemized statement of payment of costs. 22 NYCRR 691.20(b). Clearly this rule of disclosure belies any contention that client identity and retainer fee arrangements are privileged. The limited confidentiality provisions in that rule do not support Plaintiffs' position. The rule provides for disclosure to anyone upon order of the presiding justice of the Appellate Division. 22 NYCRR 691.20(c). The rule clearly contemplates that when good cause has been shown, the information can be disclosed. *Cf. In re Two Grand Jury Subpoenae*, 793 F.2d at 73-74 (finding that New York's regulatory interest in limited confidentiality of retainer fee information does not prevent compliance with a federal subpoena to disclose such information to a grand jury).

Moreover, Plaintiffs waived any privilege when they voluntarily disclosed two retainer agreements – those for the Departments of Bolivar (Ex. E) and Narino (Ex. C) – in response to Defendants' motion to disqualify. As noted above, they also argued in that same response that there are dramatic differences among the Colombian retainer agreements. In the EC case, Plaintiffs represented to Judge Garaufis that there were similarities in the agreements but that the offending provisions of the Colombian agreements were not in the EC retainer agreement. (11/27/00 Tr. at 21.) The Fairness Doctrine prevents a party from partially disclosing or relying on allegedly privileged

information to support a claim or defense and then seeking to shield the information from disclosure to the other party. *In re Grand Jury Proceedings*, 219 F.3d 175, 182 (2d Cir. 2000); *United States v. Bilzerian*, 926 F.2d 1285, 1292 (2d. Cir 1991), *overruled on other grounds by United States v. Gaudin*, 515 U.S. 506 (1995). If a party, by virtue of a claim or defense, places the substance of an otherwise privileged communication at issue, then the privilege is waived and the party must produce the privileged communication. *See In re: Grand Jury Proceedings*, 219 F.3d at 182; *see also State-Wide Capital v. Superior Bank*, 2000 WL 20705 at *1 (S.D.N.Y. Jan. 12, 2000) ("The attorney-client privilege cannot be used as a rattle to deter or inhibit . . . a legitimate inquiry[.]"); *Worthington v. Endee*, 177 F.R.D. 113, 116 (N.D.N.Y. 1998) ("[T]he [attorney-client] privilege is not absolute and cannot simultaneously be used both as a shield and a sword."); *Brimley v. Hardee's Food Sys.*, 1995 WL 51177 at *2 (S.D.N.Y. Feb. 9, 1995) ("[I]f the client places the substance of an otherwise privileged conversation in issue in litigation . . . the client may not disclose so much of the privileged communication as serves the client's interest while protecting the balance from disclosure."); *WLIG-TV, Inc. v. Cablevision Sys. Corp.*, 879 F. Supp. 229, 233 (E.D.N.Y. 1994) ("[T]he privilege may implicitly be waived when [a party] asserts a claim that in fairness requires examination of protected communications.") (citing *Bilzerian*). In contravention of the Fairness Doctrine, Plaintiffs here selectively disclosed information about the retainer agreements when it benefited them. Therefore, Defendants are now entitled to see these agreements in order to respond adequately to Plaintiffs' assertions and to make a full record for court review.

Plaintiffs attempt to protect the EC retainer agreement by asserting – without explanation – that it is "highly confidential" (they do not make the same claim for the Colombian agreements). Yet, the Colombian agreements contain a provision contemplating that the agreements will be publicly disclosed and "may be registered with the court where the complaint relating to the smuggling of tobacco products into the [Department] was filed." (Defendants' Motion, Ex. D2 at 3; Plaintiffs' Response, Exs. C, E.) Given Plaintiffs' representation of similarities between the Colombian and the EC retainer agreements, it may well be that the EC retainer agreement also contains this provision contemplating disclosure. Such provision would defeat any claim of expected confidentiality by the European Community.

Finally, Plaintiffs' counsel's letter cites no authority for submitting *ex parte* to the Court its brief on the issue of disclosure of the retainer agreements. We are aware of no authority for such a submission and respectfully suggest that the *ex parte* submission is clearly inconsistent with this Court's December 21 order. As stated in my earlier letter to the Court, we need to see the brief in order to be able to respond to it as required by the Court's order.

Accordingly, we respectfully reiterate our request that the Court order Plaintiffs to comply with its December 21 order to file all of the retainer agreements in these cases with the Court and to file publicly and serve any objection to the disclosure of those retainer agreements to the Defendants.

Respectfully submitted,

/s/

Irvin B. Nathan

Enclosure

cc: All Counsel of Record